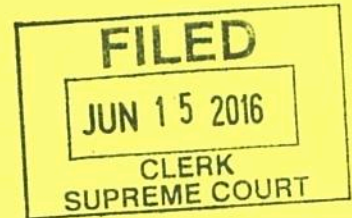


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
NO. 2015-SC-000158-D
(2013-CA-002165)



WANDA JEAN THIELE AND
WANDA JEAN THIELE AS
EXECUTRIX OF THE ESTATE
OF HIRAM CAMPBELL, JR.

MOVANTS

VS

REPLY BRIEF FOR MOVANTS

KENTUCKY GROWERS
INSURANCE COMPANY

RESPONDENT

CERTIFICATE

The undersigned attorney hereby certifies that a copy of the record in this action was not removed from the Office of the Clerk of the Supreme Court of Kentucky and further that a copy of the reply brief on behalf of the Movants, Wanda Jean Thiele and Wanda Jean Thiele, Executrix of the Estate of Hiram Campbell, Jr. was served upon:

Don A. Pisacano
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271 West Short Street, Suite 600
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David A. Tapp, Judge
50 Public Square
Somerset, Ky. 42501

and that 10 copies were filed with the Clerk of The Supreme Court of Kentucky and a copy was mailed to the Clerk of the Court of Appeals and the Trial Court on this 14 day of June, 2016.

A handwritten signature in dark ink, appearing to read "Robert R. Baker", written over a horizontal line.

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ARGUMENT

In reply to the brief of Kentucky Growers, counsel for the Movant, responds as follows:

THE POLICY OF INSURANCE ISSUED BY KENTUCKY GROWERS IN THIS CASE IS AMBIGUOUS IN THAT IT DOES NOT DEFINE THE MEANING OF COLLAPSE

At pages 5-11 of the brief of Kentucky Growers, submits that the terms of the policy issued to Hiram Campbell, Jr. are not unambiguous. That simply is not correct. The policy provides for Kentucky Growers to pay for damages resulting from collapse, but does not define or explain the meaning of the term collapse. The policy clearly provides coverage for collapse. At No. 8 of the INCIDENTAL PROPERTY COVERAGES (R/A 10) states: Collapse- We pay for direct physical loss to property covered under Coverages A,B, and C involving the collapse of a building OR ANY PART OF A BUILDING(emphasis added) caused only by the following; (b) hidden insect or vermin damage or hidden decay.

The issue for this Court is whether the term "Collapse" which is not defined in the Kentucky Growers policy requires a complete falling down of the structure as claimed by Kentucky Growers. This is the ambiguity that must be resolved.

There are two lines of decisions in this regard. Those that require a complete falling to the ground of a structure to trigger coverage and those who state that only that there be evidence of "damage which alters the basic stability of a structure to prove collapse for coverage". (Couch on Insurance, 3rd Ed. Sec 153:81.)

AMBIGUITIES ARE TO BE RESOLVED IN FAVOR OF THE INSURED

It has been the law in this state for 100 years that ambiguities are to be resolved in favor of the insured so as to provide coverage. This Court in *Pacific Life Ins. Co. v McCabe*, 162 S.W. 1136, 157 Ky. 270 (1914) stated at page 1138 “The insurer selects his own language and in case of doubt, the policy will be construed in favor of the insured”. This has continued and in *Bidwell v Shelter Mutual Insurance Co.* 367 S.W. 3rd 585 the Court stated “Thus, when ambiguities exist, we resolve them against the drafter,...” Here the policy language was the sole creation of Kentucky Growers and if an ambiguity in regard to the meaning of collapse exists, it must be resolved in favor of the insured.

**KENTUCKY GROWERS CLAIM THAT
MOVANT MAY NOT RECOVER EVEN IF
NIAGARA FIRE INSURANCE V CURTSINGER IS
OVERRULED IS SIMPLY NOT CORRECT**

Neither Kentucky Growers nor Jean Thiele know the effect of this Court’s decision if it overrules *Niagara Fire Insurance v Curtsinger*, supra and determines that a total collapse is not required to provide coverage. The policy clearly states that Kentucky Growers “will pay for direct physical loss to property,..., involving collapse of a building OR ANY PART OF A BUILDING, caused by hidden insect, vermin, or hidden decay.” This Court may like the Court in *Niagara Fire Insurance Co. v Curtsinger*, supra return the matter to the Trial Court for trial on those damages this Court may allow. The photographs submitted into the record and attached to both movant and appellees brief, clearly show collapse to a substantial part of the dwelling.

**THE POLICY ISSUED JANUARY 11, 2011
DID NOT CHANGE THE RIGHTS OF THE
THIELE OR THE OBLIGATIONS OF
KENTUCKY GROWERS**

Kentucky Growers submits to this Court that the issuance of a policy on January 20, 2011 modified the obligations of Kentucky Growers under the policy issued

November 30, 2004. Jean Thiele filed a claim on January 3, 2011 for the damages in this matter. Kentucky Growers cites to the Court the cases of *Hodgin v Allstate Ins. Co.* 935 S.W. 2d 614 and *Goodin v General Acc. Fire & Life Assurance Corp.* 450 S.W. 2d 252 as authority for said claim. Neither of these cases involve modification of a policy of insurance once the accident or claim has been made. They simply are not authority for the position of Kentucky Growers.

**THE ISSUE OF PROSPECTIVE
APPLIABILITY OF THIS COURTS
DECISION IF NIAGARA FIRE
INSURANCE CO. V CURTSINGER IS
OVERULED**

If this Court overrules the decision of *Niagara Fire Insurance Co. v Curtsinger*, *supra* the effect thereof should be as set out in *Hilen v Hays* 673 S.W.2d 713(1984) when this Court stated that the decision would apply as follows: (1) to the present case; (2) to all cases tried or retried after the date of this opinion and (3) to all cases pending including appeals, in which the issue has been preserved. It does not appear from a review of the appellate cases in Kentucky by both counsel that the issues of the meaning of “collapse” in cases such as this one is a treasure trove of cases for litigation.

CONCLUSION

It is respectfully submitted that for the reasons set out in the appellants brief and this reply brief that this Court should find that the case of *Niagara Fire Insurance Co. v Curtsinger*, 361 S.W. 2d 762 in regard to the question of collapse is no longer the controlling case law in Kentucky and issue an opinion reinstating the judgment of the Lincoln Circuit Court or state the rights and obligations of the appellant and appellee under the facts of this case.



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